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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL FEDERATION OF THE BLIND, INC., AND NATIONAL FEDERATION OF THE BLIND OF MISSOURI,

Petitioners,

v.

DENISE CROSS AND SALLY L. HOWARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the earlier opening of a public forum for the dissemination of speech to the blind by the Missouri Rehabilitation Services for the Blind (RSB), together with the Rehabilitation Act's requirement that information be disbursed to the blind, operate to make the RSB's forum a limited public forum for First Amendment purposes?

2. Did the RSB prohibitions on literature distribution and communications regarding the National Federation of the Blind (NFB) constitute impermissible, content-based restraints on NFB's First Amendment rights?

3. Do the NFB and its local Missouri affiliate--nonprofit advocates and service providers for the blind--have Article III standing to challenge on behalf of their members and other blind consumers the RSB prohibition against its employees distributing NFB literature to and discussing NFB services with blind Missourians on the grounds that it violates the Rehabilitation Act, 29 U.S.C. §§720-796(1)?

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NATIONAL FEDERATION OF THE BLIND, INC., AND NATIONAL FEDERATION OF THE BLIND OF MISSOURI,

Petitioners,

v.

DENISE CROSS AND SALLY L. HOWARD,

Respondents.

The National Federation of the Blind, Inc. (NFB), and National Federation of the Blind of Missouri (NFB-Missouri) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a-18a) is reported at 184 F.3d 973 (1999). The opinion of the district court (App., infra, 20a-33a) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 12, 1999 (App., infra, 19a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioners sought, inter alia, to challenge respondents' refusal to permit their employees from distributing NFB literature and conveying information regarding NFB services as violative of the Rehabilitation Act, 29 U.S.C. §§720-796(1). Because the courts below found that petitioners had no standing to raise these issues, they had no occasion to interpret the Act.

STATEMENT OF THE CASE

Petitioner NFB-Missouri brought suit in August 1996 in the United States District Court for the Eastern District of Missouri against the Missouri officials (now respondents Cross and Howard) operating its Rehabilitative Services for the Blind (RSB). Subject-matter jurisdiction was based, *inter alia*, on 28 U.S.C. §§1331 and 1343(a). It asserted that RSB's enactment in 1994 of a policy prohibiting RSB employees from distributing literature and discussing services offered by consumer groups, such as NFB-Missouri, violated the Rehabilitation Act and the First and Fourteenth Amendments. An amended complaint later brought in the National Federation of the Blind (NFB), NFB-Missouri's parent organization, as a co-plaintiff.

On cross motions for summary judgment, the district court held that petitioners had no standing to sue under the Rehabilitation Act and that RSB had not denied them First Amendment and Equal Protection rights.

In an opinion filed on July 12, 1999, the United States Court of Appeals for the Eighth Circuit affirmed, with one judge dissenting as to the standing issue. On October 8, 1999 petitioners filed this timely petition for certiorari.

A. Petitioners and the Rehabilitation Act

NFB and NFB-Mo seek to promote the welfare of the blind by assisting them in integrating into society and by changing society's mistaken attitudes that blind persons are helpless and must be dependent on others. Critical to the issues in this case, NFB is not only an advocacy organization, but also a provider of rehabilitative and vocational services for blind persons. Additionally, NFB, which publishes training materials and other informational literature, is the only concentrated source of materials by the blind for the blind.

Another blind-run organization in Missouri, the Missouri Council of the Blind (MCB), also seeks to advocate for blind persons, but in a more limited fashion. NFB and MCB greatly differ in philosophy and approach. NFB rejects the stereotype that blindness is a totally compromising disability. Instead, it argues, blindness is more like a nuisance, for which alternative techniques can generally be mastered that will permit a blind person to compete and cooperate on equal terms with all people. MCB strongly disagrees with this perspective.

A number of other organizations exist that purport to promote the interests of blind Missourians or to offer them services, resources and training materials. Unlike NFB and MCB, these organizations are not composed of the blind. The restrictions imposed on agency staff with respect to NFB services and literature apply only to blind consumer groups; RSB employees are freely permitted to distribute the literature or describe the resources of other groups directly with RSB clients.

A major distinction exists between groups that merely support the blind and those that are the blind, NFB

and MCB. The latter two organizations are referred to by RSB as "consumer groups." Each speaks from a distinct and unique viewpoint, while those that only aid the blind have a significantly different perspective and do not have the same authenticity to a newly blind consumer who may overestimate the limiting effects of blindness.

The MCB and its parent entity have historically been concerned with limiting NFB's influence in vocational rehabilitative agencies such as RSB. In 1994 it urged RSB to draft a policy to ban the use by RSB employees of training materials produced by organizations of the blind. Because MCB offers far fewer materials and programs than NFB, it would suffer far less from such a policy than would NFB. Thus, due to its disproportional impact, the ban on information relating to both organizations would work greatly to MCB's strategic benefit. NFB's more aggressive, independent voice would thereby be muted.

In September 1994 RSB responded by enacting an MCB-approved policy forbidding RSB staff from distributing any literature produced by NFB or MCB, other than an initial pamphlet to be sent by the Central Office. In July 1995 RSB expanded these restrictions, forbidding any RSB staff member from telling a consumer of the existence of any specific, relevant NFB resource, be it service or literature.

RSB employees have complained that this policy compromises their delivery of services. One Supervisor testified, for example, that it would be of greater benefit to blind consumers if RSB staff could freely advise and discuss with consumers the programs, services and resources that are

available from the organized blind, as they had before the policy was adopted.

NFB's literature is distinctive in that "so much of it has been written by blind people themselves, who have been there, who have experienced the things that our clients are trying to learn to cope with." A second unique aspect of NFB viewpoint is its portrayal of blind persons as capable of leading near normal lives, *i.e.*, cutting the grass, taking a trip to New York City or disciplining their children. NFB's literature uniquely tells, "firsthand that blind people are doing these things, are functional in society, and so often that is perhaps the most important thing that we have to teach . . . that its okay to be blind, that blind people can be functional . . . ."

Nell Carney, Commissioner of the Rehabilitation Services Administration under President Bush, with extensive experience as a rehabilitation counselor, manager and director of state rehabilitation services programs, and a blind former member of both NFB and ACB, explained that the policy at issue "injure[s] blind consumers and . . . substantially interfere[s] with successful rehabilitation procedures." Ms. Carney outlined a long list of impediments brought on by the challenged policy.

B. Proceedings Below

The Eight Circuit found that NFB had insufficiently alleged harm to itself caused by an RSB violation of the Rehabilitation Act. Despite the evidence that blind consumers' use of its Job Opportunities for the Blind program had decreased 90% since implementation of the challenged policy, it concluded that NFB offered no evidence of harm to its membership size or its ability to provide information. Because it found no sufficient allegations that

NFB has suffered injury in fact, it furthermore found its assertion of *jus tertii* standing to be inadequate. It finally found that NFB insufficiently alleged injury in fact to its members. Because of its "no-standing" ruling, it did not address petitioners' claims under the Rehabilitation Act.

The Eighth Circuit rejected NFB's First Amendment claim by finding that RSB had not intentionally created a public forum. Its sole authority for this holding appears to have been the absence of any case law on point. It failed to consider whether the mandates of the Rehabilitation Act helped create a limited public forum.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented Are Important

This case presents two major issues that involve rights important and fundamental to our society: (i) the scope of access to the federal judicial system and (ii) the limits of state action on free speech. By denying petitioners standing, the Eighth Circuit has made it almost impossible for blind persons who have been denied information regarding statutorily required state services to sue to enforce such rights. Furthermore, the opinion permits a state agency to muzzle free speech directed toward aiding the blind citizens of a community.

A. The Importance of the Standing Issue

Blind persons are entitled to the delivery of various services from a state under the Rehabilitation Act, 29 U.S.C. §§720-796(1). These services include the provision of sufficient accurate information about available resources and providers to permit RSB clients to make meaningful choices. Id. §721(20)(A). Plaintiffs' suit challenged, as violative of

the Act, Missouri's practice of refusing to permit its employees to inform blind persons of the existence and availability of a significant portion of these services.

It is factually impossible for a blind Missourian to sue on his or her own to litigate this issue. Once this person learns of the information concerning NFB services by any route, he or she no longer has been denied it. If, however, blind persons are never informed of the existence of these services or the identity of their providers, they not only will never be able to benefit from the services, but will not know of their right to sue under the Act for the denial of these services. *See Lepelletier v. Federal Dep. Ins. Corp.*, 164 F.3d 37, 43 (D.C. Cir. 1999).

Consequently, suit, almost by necessity, must be brought by another affected entity, such as NFB. As an advocate for the blind and service provider to the blind, NFB and NFB-Missouri are uniquely positioned to sue to enforce laws that aid the blind. These entities have knowledge of what services are being provided and who is entitled to them. Because they have this knowledge and the intended beneficiaries of the Act do not, only NFB and its affiliate are capable of suing to enforce the rights of the blind.

The majority of the Eighth Circuit panel held, however, that petitioners had no standing--either on behalf of themselves, their blind members, or third-party blind persons--to challenge the alleged failings of Missouri's RSB. This was despite the fact that NFB and NFB-Missouri themselves were harmed (their literature was banned), their members were harmed (they did not receive the literature), and third parties(other blind Missourians) were harmed (by not receiving literature and information about NFB services).

Standing in this fairly recurrent fact pattern must be recognized in order to escape the "Catch 22" which would otherwise result: those with knowledge would have no claim, and those without knowledge that they have been denied literature and other information would not know that they have been harmed, and therefore not attempt to sue.

B. The Importance of the First Amendment Issue

Petitioners' First Amendment claim raises core issues directly bearing on the scope of the guarantees of this most fundamental constitutional right. Although as the Eighth Circuit noted, petitioners present "a rather unique theory," it arises from a fact pattern that lends itself to frequent manifestations. Reduced to its essence: For a significant period of time a state agency opened up a channel of communication as a public forum. The channel consisted of state agency employees having the ability freely to inform the agency's blind clients of the services of an important provider to the blind and copies of its literature, which were crucial to the interests and well being of the blind clients. This open channel of First Amendment communication, therefore, ran from the literature and services provider through the employees and to the clients.

This open channel was arbitrarily closed by the state agency in 1994 and 1995 only as to NFB and MCB, thereby banning the flow of NFB literature through the previously existing channel. This banishment takes on even more seriousness when its value to the blind community is considered. Now, for example, the NFB magazine *Voice of the Diabetic* cannot be given to blind diabetics in need of learning from a first-hand source how to self inject insulin and otherwise cope with the onset of diabetes.

Dual forces opened this public forum. First, the state did so by permitting its operation prior to 1994. Second, by requiring that the state agency provide accurate information about available resources and providers, 29 U.S. §§721(20)(A) & 722(d)(4), the Rehabilitation Act required it. The issue of whether a public forum now exists is of importance to every situation with a similar interplay between a service provider, a state employee, and the state agency's clientele.

II. The Decisions of the Court of Appeals Were Erroneous

A. Petitioners Have Standing under the Rehabilitation Act

The circuit court should have recognized that NFB and its affiliate had standing either in their own right, in that of their members, or in that of third-party blind Missourians. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976)

The record clearly indicates that the challenged policy had produced negative results and has harmed the blind community. Blind clients are now given insufficient information. They are furthermore denied literature written by the blind for the blind--literature that has the unique value of the first-person perspective. A former federal official testified that on a systemic basis the challenged policy "injure[s] blind consumers and substantially interfere[s] with successful rehabilitation procedures." Furthermore, as the dissent pointed out, NFB demonstrated that the challenged policy had decreased by 90% the referrals to its Job Opportunities for the Blind program.

The circuit court, in essence, ruled that in order to have standing NFB must hunt down an individual who was actually harmed by the RSB policy. Thus, it ruled, it is insufficient to allege that the system as a whole--due to the challenged procedure--is operating to harm blind persons in general. This approach is at odds with the Court's decision in *Adarand v. Pena*, 515 U.S. 200 (1995), which permitted a government contract bidder to challenge the overall bidding system even though the contractor could not show that he would have been the low bidder and therefore directly harmed. Thus, the Court has recognized that an allegation of systemic harm is sufficient to confer standing. Here, the RSB policy was alleged to disseminate NFB information inadequately, thus casting a general harm upon NFB, its blind Missouri members, and other blind Missourians in need of rehabilitation information.

By ignoring these standard standing rules, the circuit court has departed from this Court's teachings and created a conflict with other circuits. *See, e.g., Lepelletier v. Federal Dep. Ins. Corp., supra.*

B. Petitioners Were Denied Their First Amendment Rights

The acts taken by RSB prior to 1994 of opening up a channel of communications for NFB literature constituted its intentional "opening [of] a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). RSB then permitted the distribution of literature from all sources of the public. This public forum was not opened by inaction, but by an intentional effort to permit the distribution of information to allow blind consumers of RSB services to make meaningful choices about their own vocational rehabilitation--a statutory responsibility with which RSB is charged. This channel of

communications as a natural one, fully compatible with the goal of delivering important information to RSB clients. As such, it carries all of the hallmarks of a "limited public forum." *Id.*

Not only did this limited public forum exist in fact, federal law required that it opened. RSB is the primary public means by which blind Missourians in need of rehabilitation services can learn of the choices available to them. In creating the Act and instrumentalities to carry it out, Congress's intent was to create an information system so that blind persons would not merely be passive recipients of rehabilitative services, but, instead, co-designers of their own rehabilitative programs. Thus, under 29 U.S.C. §721(a)(19), RSB must establish a system whereby: "eligible individuals . . . will be provided information and support services to assist . . . [them] in exercising informed choice throughout the rehabilitation process . . . ." Furthermore, under 29 U.S.C. §721(a)(20), RSB must assure that: "individuals with disabilities will be provided accurate vocational rehabilitation and guidance, using appropriate modes of communication, to assist such individuals in preparing for . . . employment . . . ." Consequently, by congressional mandate, RSB is directed to serve as a channel of communication to assist the blind in gaining information to aid in their rehabilitation.

Regardless of whether the challenged forum is a "limited public forum," RSB's challenged policy of muzzling NFB's speech is not viewpoint neutral and, accordingly, violates the First Amendment. On its face the policy is just applied to "consumer groups," *i.e.*, those which speak from the unique viewpoint of the blind person. In actuality, however, the policy is directly aimed at quashing only NFB's viewpoint. As explained above, it was MCB, with its more limited literature offerings, that convinced RSB to banish all

consumer group literature, knowing that the burden would fall far more harshly on NFB. RSB's acceptance of the limits proposed by MCB has, in essence, conferred upon MCB "broad powers of censorship, in the form of a 'heckler's veto.'" *Reno v. American Civil Liberties Union*, 521 U.S. 844, 864 (1997). Government entities should not be permitted to restrict one party's free speech at the behest of that party's opponent. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133-35 (1992).

By its prohibition, RSB has muzzled the more confident NBF voice that states that it is "okay to be blind," independent and capable of self help. It silences the viewpoint that blindness is more of a nuisance or personal characteristic, akin to so many other limiting characteristics, such as age, I.Q. level, lack of money, etc. Because RSB came forth with no reasonable or compelling need for this limit on free speech, it should fail constitutional muster.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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